BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BEVERLY TULL	)	
Claimant	)	
	)	
VS.	)	
	)	
ATCHISON LEATHER PRODUCTS	)	
BERGER COMPANY, INC.	)	
Respondents	)	Docket No. 258,286
	)	
AND	)	
	)	
FIREMAN'S FUND INS.	)	
SUPERIOR NATIONAL INS. CO./REM	)	
ST. PAUL FIRE & MARINE INS. CO.	)	
COMMERCE & INDUSTRY INS. CO.	)	
CINCINNATI INS. CO.	)	
Insurance Carriers	)	

ORDER

Respondent Atchison Leather Products (Atchison) and one of its insurance carriers, Commerce & Industry Insurance Co. (Commerce), requested review of the May 3, 2005 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on October 18, 2005.

APPEARANCES

Dennis L. Horner, of Kansas City, Kansas, appeared for the claimant. William G. Belden,[1] of Merriam, Kansas, Anne E. Hawley,[2] of Kansas City, Missouri, Thomas J.

[1] Represents Atchison and Commerce & Industry Ins. Co. (Commerce).

[2] Represents Atchison and Fireman's Fund Insurance Co. (Fireman's).

Walsh,[3] of Kansas City, Kansas, and Katharine M. Collins,[4] of Overland Park, Kansas, appeared for Atchison and its respective insurance carriers. Jennifer Arnett, of Overland Park, Kansas, appeared for respondent Berger Company, Inc. (Berger) and its insurance carrier Cincinnati Insurance Company (Cincinnati).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument, the parties agreed that the 21 percent whole person permanent impairment awarded by the ALJ was not in dispute.

ISSUES

The ALJ concluded claimant sustained a series of accidents to her upper extremities culminating in an injury on April 23, 2002, the date she last worked for Atchison. He further concluded "there is no evidence her condition worsened although it did remain symptomatic-as it probably will for the rest of her life regardless of her activities."[5] Accordingly, the entirety of the permanency was assessed to Atchison rather than Berger, claimant's subsequent employer. Although Commerce, Atchison's carrier on the risk as of April 23, 2002, disputed timely notice and written claim *of a series of accidents*, the ALJ rejected that defense, specifically finding that notice and written claim were timely.[6]

In addition, the ALJ found Atchison and Superior, its carrier on the risk at the time the left carpal tunnel surgery was recommended, liable for the medical expenses and temporary total disability benefits attributable to that procedure. He also found the balance of claimant's treatment was to be paid by the carrier on the risk at the time the expense was incurred, with the sole exception of the cost of Dr. Sandow's examination, an expense that was to be shared equally by all the carriers.

Respondent and Commerce contend the ALJ erred in allowing the claimant to "amend" her Application for Hearing after the first Regular Hearing so as to include Commerce in the proceedings. Commerce also contends it, as the insurer, had no notice of claimant's *series of injuries* culminating in an accident as of her last date of work with Atchison. Commerce also suggests the ALJ should not have dismissed the remaining insurers and/or Berger, leaving Commerce as the only carrier.

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[3] Represents Atchison and Superior National Ins. Co./REM (Superior).

[4] Represents Atchison and St. Paul Fire & Marine Ins. Co. (St. Paul)

[5] ALJ Award (May 3, 2005) at 4.

[6] *Id.*

Commerce, as Atchison's carrier as of April 23, 2002, argues that the correct accident date is December 2004 or January 2005, the date Berger, claimant's present employer, reassigned her to a different job.

The balance of the litigants' varying postures for purposes of this appeal depend on their relative legal positions.[7] Claimant asks the Board to affirm all of the ALJ's findings although like Commerce, she suggests that the more appropriate date of accident is December 2004 or January 2005, the date that reflects her present employer's decision to reassign her to a lighter, less repetitive position within its' plant, thereby eliminating the more repetitive and forceful task of sewing leather knife sheaths.

St. Paul and Fireman's take much the same position as claimant, suggesting that the Award should be affirmed, in essence holding both these insurers harmless from any liability in this matter. Or, if modified, only the date of accident should be altered, thus reflecting the assertion that claimant's present employer, Berger, should be responsible for claimant's permanent impairment.

Superior argues the ALJ erred in his decision to order Superior to pay benefits for treatment that occurred outside its coverage period. Distilled to its essence, Superior argues that it has been made to pay medical benefits and temporary total disability compensation for a period outside its coverage dates, and that it is due reimbursement from those carriers responsible during those respective periods. In response, St. Paul, as the carrier who was on the risk at the time most of claimant's treatment occurred, contends the ALJ correctly assessed the liability for the carpal tunnel treatment to Superior as that carrier attempted to delay claimant's treatment in an effort to avoid responsibility for such treatment. And St. Paul asserts that if the date treatment is recommended is controlling rather than the date the treatment is provided, then that rule should hold true for each of the carriers and not just Superior.

Berger, claimant's most recent employer and Cincinnati, its carrier, contend the Award should be affirmed in all respects. Berger maintains claimant's job was as of April 24, 2002, from the outset, less strenuous and therefore did not cause her further injury. Thus, the ALJ was correct in declining to assess any permanency against Berger as a result of claimant's work activities.

The issues to be decided by this appeal are as follows:

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[7] While Atchison is a party to this litigation, as a practical matter this is a dispute between Atchison's carriers and claimant's subsequent employer, Berger, and its carrier. Fireman's coverage period was from November 7, 1998 to November 7, 1999 followed by Superior, whose coverage period was from November 7, 1999 to November 7, 2000. St. Paul's coverage period was from November 7, 2000 to November 7, 2001. Commerce was the last carrier in the sequence, with a coverage period from November 7, 2001 up through claimant's last date of work. Berger, claimant's subsequent employer, was insured by Cincinnati for all relevant dates.

1. Date of accident(s);
2. The propriety of allowing claimant to amend her claim after the expiration of the initial set of terminal dates;
3. Timely notice and written claim;
4. Dismissal of the other carriers, to the detriment of Commerce;
5. Nature and extent of claimant's permanent impairment; and
6. Reimbursement of sums paid by Superior for temporary total disability benefits and medical expenses incurred outside its coverage period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This is the third appearance before the Board of this claim and as is all too often the case, the claim, its procedure and factual history have become more complicated with each presentation. In order to expedite the present opinion, the Board's earlier recitation of the facts, as then developed and recited in the Order dated January 28, 2005, is hereby adopted and will not be restated. Likewise, the ALJ's recitation of the facts in his Award are found to be supported by the record and are hereby adopted by the Board.

Suffice it to say, this run-of-the-mill work-related injury has been unwittingly transformed into a massive piece of litigation by the mere change of carriers over the course of 4 years. A significant portion of this present appeal stems from this aspect of the litigation because when this case was initially processed by the ALJ for a decision, it came to light that the last carrier in the liability chain who arguably was on the risk as an insurer for Atchison had not been brought into the litigation. The ALJ suspended the terminal dates and the parties regrouped, allowing Commerce, Atchison's carrier on April 23, 2002, the last date claimant was employed by Atchison, to be included in the litigation. Claimant then changed employers (who had yet another carrier) on April 24, 2002. Her job for this subsequent employer, Berger, was arguably the same or at least substantially similiar until late December 2004 or January 2005.

As Atchison's carrier on the risk as of April 23, 2002, claimant's last date of employment with Atchison, Commerce was assessed the liability for the 21 percent whole body permanent partial impairment. Superior, the carrier on the risk during the period of time claimant was advised to have surgery for her left carpal tunnel complaints, was assessed the cost of medical treatment and temporary total disability benefits associated with that procedure, despite the fact that those bills were not incurred within its coverage period. The balance of the medical expenses and temporary total disability benefits were assessed against the carrier on the risk at the time the expenses were incurred, although it appears from exhibits that Superior paid a substantial amount of those bills.

There is no dispute that claimant sustained an accidental injury arising out of and in the course of her employment over a period of time. Rather, the question is that one so frequently posed in workers compensation cases - on what date did claimant's accident occur? There is no dispute that claimant's job as a sewer/assembler gave rise to upper extremity complaints beginning in September 1999. Indeed, the record indicates claimant filed her claim on her own without the aid of an attorney. She was sent for treatment with Dr. Shriwise who indicated she had physical complaints about both wrists and her left shoulder. In June 2000, Dr. Shriwise recommended surgery for the left wrist, but this was not authorized by Superior in spite of efforts by claimant and Atchison that the procedure be done.

By this time, claimant was unable to continue working her normal overtime hours as the pain in her hands and shoulder was increasing. She sought legal counsel in order to obtain the medical treatment the authorized treating physician had recommended. A preliminary hearing was held on November 22, 2000, and at that point, only two insurance companies were participating Fireman's and Superior. What no one apparently appreciated was that as of November 7, 2000 Superior was no longer on the risk and had been replaced by St. Paul, an insurer that was not present at the hearing.[8]

A substantial portion of this preliminary hearing was spent discussing claimant's claim. Her entitlement to the medical treatment and temporary total disability benefits was uncontested. It is clear from the transcript that claimant was falling victim to a dispute between insurance carriers. No one disputed her need for treatment or the causal connection between her symptoms and her work activities. Rather, it was merely a fight as between two companies that had contractual obligations to insure Atchison for workers compensation claims and their desire to avoid that liability, effectively delaying treatment with the obvious goal of depositing the liability on the subsequent carrier's doorstep.

The ALJ issued an Order finding Atchison and both its carriers, *jointly and severally* liable for the treatment outlined by Dr. Thomas Shriwise.[9] This preliminary hearing Order was appealed to the Board. While it was dismissed for lack of jurisdiction, the Board noted the following:

> Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with

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[8] Superior and Fireman's were the only insurers represented at the hearing. This preliminary hearing Order was appealed to the Board. Both Superior and Fireman's filed briefs with the Board. Superior indicated that a new carrier was now involved [p. 2 of brief filed Jan. 22, 2001]. The Board's Order, dismissing the appeal for lack of jurisdiction, includes St. Paul as a party and a copy of the Order was provided to St. Paul.

[9] ALJ Order (Nov. 28, 2000).

> questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968); Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 279 (1961).[10]

After the recommended surgical procedure, claimant returned to regular duty in January 2001, but her symptoms continued. Even with injections and physical therapy, her complaints increased. In October 2001, claimant had shoulder surgery and after a period of time off work, she again returned to her regular work duties with Atchison.

Atchison then decided to sell a portion of its business to a customer, Berger. This transaction involved not only the acquisition of a business and tradename, but also involved the re-employment of some of Atchison's employees, including claimant. Claimant last worked for Atchison on April 23, 2002.

On April 24, 2002, claimant began working for Berger. According to claimant, she had much the same work duties but the pace and the work atmosphere at this new job were less demanding and stressful. In December 2002, the claimant notified Berger about her work-related claim and her job responsibilities were somewhat reduced to avoid any further problems. Although she still sometimes sewed the leather sheaths as she did for Atchison, the leather was more pliable and required less strength and she was allowed to "float" between positions, thereby avoiding repetitious activities.

On July 15, 2002, just a few months after she began working for Berger, claimant saw Dr. Edward J. Prostic at her lawyer's request. At that point in time, her complaints were bilateral shoulder pain with the pain being the worst on the right side. She also had pain in her left forearm. Dr. Prostic opined that claimant during her employment with Atchison through December 2000 sustained repeated minor trauma to her upper extremities. He also found that claimant developed recurrent left carpal tunnel syndrome and continued to have rotator cuff irritability of the right shoulder and osteoarthritis of the left shoulder. He felt that claimant should not return to work that required repetitious forceful gripping left-handed, more than minimal use of the hand in the flexed wrist position, and should avoid repetitious forceful pushing or pulling or more than minimal use of her hands above shoulder height.[11] Dr. Prostic assigned claimant a 18 percent permanent partial impairment to the right upper extremity, 30 percent to the left upper extremity and combined the two for a 27 percent impairment of the whole body on a functional basis.[12]

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[10] Tull v. Atchison Products, Inc., No. 258,286, 2001 WL 507211 (Kan. WCAB Apr. 9, 2001).

[11] Prostic Depo., Ex. 2 at 3.

[12] *Id.* at 30.

In November 2002, claimant was evaluated by Dr. Theodore Sandow pursuant to K.S.A. 44-510e(a). He opined the claimant bears a 20 percent left wrist impairment as a result of a median nerve entrapment and an 8 percent right shoulder and 11 percent left shoulder impairment. When combined, this yields a 21 percent whole person impairment.

Neither Dr. Prostic, nor Dr. Sandow apportioned their permanency opinions between claimant's work for Atchison or Berger. Nor are there any other medical opinions contained within the record.

In late 2004, claimant noticed an increase in her symptoms due to an increase in orders to be filled. As a result, Berger reassigned claimant to the "roto lab" in January 2005, a position that apparently eliminated any aggravation of her symptoms, at least insofar as the record discloses.

Given this set of facts, the date of accident was, from the outset, a hotly contested issue.[13] Claimant pled this case as a series of injuries commencing September 8, 1999 and continuing *ad infinitum*. After an initial skirmish over treatment in 2000, claimant was provided treatment and paid temporary total disability benefits, mostly at the expense of Superior. As the case progressed, a prehearing settlement conference was held and a regular hearing was scheduled for February 26, 2004. As is this particular ALJ's normal procedure, but notably contrary to the statutory scheme, the regular hearing date is considered the claimant's terminal date. At the hearing the respondents and their carriers were assigned terminal dates. After hearing the claimant's testimony about the nature of her work, and the fact that she had last worked for Atchison on April 23, 2002, the ALJ discovered that one insurer (Commerce) was inadvertently omitted from the proceedings. And there was some concern about whether claimant had alleged a series of accidents solely against Atchison or whether the series of accidents allegation was only against Berger. The ALJ brought this issue to the parties, via a letter dated February 27, 2004.

On March 9, 2004, claimant sought permission to file an amended E-1 to include a notification to Commerce and to make it clear that a series of injuries was being asserted against both Atchison and Berger. By this point in time, claimant's terminal date had passed.[14] Commerce was notified of the claim and counsel entered his appearance on behalf of Atchison and Commerce. But counsel objected to his client's belated inclusion in this litigation, asserting that the Kansas Workers Compensation Act provides no basis

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[13] See the Board's opinion dated January 28, 2005 which sets forth the specific contentions made by claimant as to the date of accident in the original E-1 and each of the amendments, including the last one filed on April 6, 2004 which alleges a date of accident of September 8, 1999 through April 23, 2002 against Atchison and beginning April 24, 2002 to the present, against Berger.

[14] This ALJ's policy (which is unique among all the ALJ's in the Division) is to require the claimant to complete the submission of all evidence, including depositions, as of the date of the Regular Hearing.

for allowing claimant to change "the nature of her claim to a series of accidents occurring while working for Atchison . . . subsequent to the expiration of the claimant's terminal date."[15]

The ALJ considered and rejected Commerce's argument and allowed claimant to amend her E-1.[16] Thereafter, new terminal dates were established and counsel for Commerce was permitted to depose those individuals and physicians' necessary to defend its insured, Atchison. At oral argument, counsel for Commerce was unable to identify any avenue of discovery that he was unable to pursue due to his belated inclusion in the litigation. Nevertheless, Commerce is somehow aggrieved by the late nature of its inclusion.

Thereafter, on May 3, 2005 the ALJ issued his Award. Under the *Lott-Edwards*[17] rationale, he concluded claimant's date of accident was, during her employment with Atchison as there was no attenuating event while claimant worked for Berger. "Her duties at Berger were substantially less demanding than she had had at Atchison, she was allowed to rotate on tasks, there was no further treatment, and there is no evidence her condition worsened although it did remain symptomatic-as it probably will for the rest of her life regardless of her activities."[18] Thus, the ALJ went on to find that claimant met with personal injury by accident "in a series of accidents through April 23, 2002 and that notice and written claim to Atchison were timely."[19]

This case aptly demonstrates the difficulty encountered when a worker suffering from a repetitive use injury continues to work for her employer and the carriers change. Following creation of the bright line rule in the 1994 *Berry*[20] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[21] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated

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[15] Atchison and Commerce's Brief at 1 (filed June 22, 2005).

[16] This Order was appealed to the Board and pursuant to the Board's Order, the appeal was dismissed for lack of jurisdiction.

[17] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[18] ALJ Award (May 3, 2005) at 4.

[19] *Id.*

[20] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[21] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[22]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[23]

The fact that the resolution of the date of accident question may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent is given little consequence by the courts.

> We fail to see why the rule laid down in *Berry* should not be applied equally in a case where the dispute is over coverage between two insurance companies. The

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[22] *Id.* at Syl. ¶ 3.

[23] *Id.*, Syl. ¶ 4.

> actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not.[24]

The Board concludes that claimant suffered a series of injuries to her upper extremities each time she returned to the same job (with Atchison) she had performed before her various treatments and surgeries. Because claimant continued to aggravate her condition after each surgery, the last day worked rule is applicable.[25] Thus, the ALJ's conclusion that April 23, 2002 was claimant's date of accident is affirmed. Claimant's last date of work, her attenuating event was her leaving Atchison's employ.

However, unlike the ALJ, the Board finds that claimant went on to sustain further injury to her upper extremities while working for Berger, culminating in a second accident in January 2005. Admittedly, by claimant's own testimony the nature of her work for Berger is less strenuous and less demanding than that at Atchison. She was allowed to "float" from job to job. However, she also testified that she was continuing to worsen and this testimony is uncontroverted. To its credit, when Berger learned of claimant's ongoing complaints, it did what it could to accommodate her complaints, eventually moving her into a significantly modified job position in the "roto lab". It was this decision that the Board believes was the second attenuating event. Accordingly, under these facts, the Board finds claimant has established a second series of accidental injuries that, by virtue of law, occurred in January 2005, when she was reassigned to the "roto lab".

At oral argument the parties stipulated to the 21 percent whole body impairment assessed by the ALJ. This figure represented the ALJ's decision to adopt the findings and conclusions of the independent medical examiner, Dr. Theodore Sandow, who examined claimant in November 2002. There is no evidence within the file indicating claimant has been examined or rated since that time. Nor is there evidence that her permanent impairment has increased. As the Board is left with no other evidence, the Board concludes the 21 percent whole body impairment is, logically, attributable to claimant's employment with Atchison. Dr. Sandow examined claimant after she had left Atchison and after she had been working for Berger for a period of months. Dr. Prostic saw claimant just two months after she left Atchison and his rating was somewhat higher. While we must acknowledge the parties' stipulation, this supports the finding that cliamant's permanent impairment did not worsen between the date of Dr. Prostic's examination and the date of Dr. Sandow's examination. Thus, Atchison and its carrier as of April 23, 2002, Commerce, are responsible for the 21 percent whole body impairment.

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[24] *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[25] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

Berger and its carrier Cincinnati are also assessed the liability for the 21 percent whole body functional impairment, although pursuant to K.S.A. 44-501(c), Berger is entitled to a credit for claimant's preexisting impairment.

The Board is unpersuaded by Commerce's argument that the ALJ denied it due process when it allowed claimant to amend her E-1 to include Commerce as a carrier. As noted by the Board in its previous Order:

> In this instance, respondent Atchison and its insurance carrier Commerce and Industry Insurance Company argue a denial of due process by the ALJ for suspending terminal dates and allowing claimant to file an amended application. However, it is noted that respondent Atchison has been a party to this action since it began. Respondent Atchison has been represented by counsel at every phase of this dispute and has had the opportunity to appear at every hearing and at every deposition, having been properly notified. The conflict arises with the appearance of Commerce and Industry Insurance Company for the date of accident including claimant's last date of employment with Atchison.
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> Every workers compensation policy in Kansas must contain a clause that provides between "any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgment rendered against the insured."[26] Respondent Atchison, through its insurance carrier Commerce and Industry Insurance Company, argue that it has been denied basic due process guarantees of notice and the opportunity to present evidence. However, it is the employer that must be given proper notice and an opportunity to be heard and to defend against a claim. The insurance company has no separate right of procedural due process flowing from the provisions of the Workers Compensation Act.
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> Throughout this proceeding, the interests of respondent Atchison have been vigorously defended, with no credible claim that the due process rights of the employer were, in any way, violated. The Board, therefore, finds the decision by the ALJ to extend the terminal dates in this matter and to expand the terminal dates to allow the parties to take the deposition of any and all witnesses, including the claimant, was well within the jurisdiction of the ALJ, and respondent's appeal from that Order should be, and is hereby, dismissed.[footnote omitted]

The Board remains steadfast in its belief that Atchison and particularly its insurer Commerce have received sufficient due process in this matter. The terminal dates originally established by the ALJ were suspended and Commerce was given every opportunity to present evidence and cross examine all the witnesses in this matter. It is

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[26] K.S.A. 1999 Supp. 40-2212.

unclear what more could have been done. And Commerce cites no prejudice or gives no example of how it has been prejudiced. Indeed, it is entirely possible that an Award could have been issued without any notice whatsoever to Commerce.[27] Moreover, it does not appear that claimant's amendment was truly asserting an additional claim. Rather, she was merely including another insurance carrier in the line of succession and make it clear that her claim as against Berger continued as claimant continued to work. In any event, Atchison's rights have been well protected and Commerce's displeasure at its delayed inclusion is not a sufficient basis for a reversal or an exemption from liability.

Similarly, the Board rejects Commerce's complaints as to lack of notice and timely written claim. K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, **is given to the employer** within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice. (Emphasis added)

K.S.A. 44-520a(a) provides for written claim to be served *upon the employer or his agent* within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year.

These statutes both address notice and timely written claim to the insured, not to its insurer. There may be some contractual obligation for an insured to inform the insurer of a claim but whether that obligation does or does not exist does not compel an injured worker to provide any additional notice to the insurance carrier. Notice to the insured, here Atchison, is established under these facts and Commerce's arguments are rejected. The ALJ's finding that notice and written claim were timely as to Atchison and Commerce is affirmed.

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[27] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

The Board does, however, agree with Commerce's concern regarding the ALJ's decision to dismiss all of the other carriers from this litigation. There is no statutory basis for dismissing the insurance carriers and doing so was improper. Commerce correctly points out that there may be issues that emerge that require those carrier's to participate in future hearings. Thus, that aspect of the ALJ's Award is reversed and set aside.

The Board must now address the final issue of payment of the medical expenses and temporary total disability benefits. The ALJ assessed the costs of the carpal tunnel surgery and any temporary total disability benefits attributable to that procedure against Superior. The balance of the bills and benefits were to be paid by the carrier "who had coverage on the date(s) in which such expenses were incurred"[28] except for the IME which was to be paid equally by all carriers.

The case illustrates the quagmire that develops when, as here, there are multiple carriers, even multiple employers, both involving the same claimant and the performance of substantially the same job activities over a period of time. While *Lott-Edwards* resolves the date of accident issue and who should be responsible for the permanency associated with a work-related injury, it did not definitively speak to the issue of which carrier should pay the ongoing expenses associated with that claim. The Board has, in the past, consistently ordered each carrier to pay the temporary total disability compensation and medical expenses incurred during its period of coverage.[29] And the Court of Appeals has affirmed that procedure.[30]

There is, however, an inherent problem with apportioning the liability for those ongoing expenses and that problem is illustrated in this case. Much like the concerns expressed by the litigants and recognized by the courts in connection with discerning the "date of accident" and the tendencies for parties to move a date of accident to before or after an advantageous time for monetary or coverage reasons, the same holds true for the decision of who pays for the medical treatment and weekly benefits.

When this claimant initiated her claim in 1999 she did so *pro se*. Her employer even helped her file the claim. And as coverage passed from one carrier to another, claimant and to a certain extent Atchison, were caught up in the coverage vortex. Neither Fireman's nor Superior wanted to provide the treatment *which no one disputed she required and was due to her work activities*, leaving her no other alternative but to hire counsel. The obvious motivation for the carriers' positions was the fact that every November, coverage would

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[28] ALJ Award (May 3, 2005) at 5.

[29] See e.g. *Lott-Edwards v. Americold Corporation*, Nos. 175,770,175,771, 223,800, 1998 WL 921307 (Kan. WCAB Dec. 28, 1998).

[30] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 697, 6 P.3d 947 (2000).

change. And at that point, claimant - and hopefully her claim - would become another carrier's problem.

The ALJ appreciated this problem following the first preliminary hearing and entered an order for medical treatment, assessing the cost of that treatment jointly and severally against Atchison and both its carriers identified at that time.[31] Although in the Award, the ALJ went ahead and followed the Board's precedent and apportioned the expenses, with each carrier paying those incurred during its coverage period. There was one exception to this finding. The ALJ found that Superior was to be responsible for those expenses associated with the carpal tunnel procedure that was recommended during its coverage period and which it refused to provide, necessitating the initial preliminary hearing in 2000.

There is some merit to both alternative approaches of the ALJ. Certainly Superior should not be permitted to blindly refuse to provide treatment all in the hopes of gaining the advantage of a change in coverage. That is the very peril that *Treaster* and its progeny sought to avoid. The difficulty with this aspect of the claim is that unlike the permanency, which is determined at the end of a case, medical expenses and temporary total disability benefits are ongoing. Any delay in these payments frequently compromises a claimant's recovery and well being and stymies the progress of the claim. It also defeats the intended purpose of the Act, which is to ensure the employer bear the expense of an accidental injury to a worker caused by the employment.[32] Thus, the Board believes a different approach is necessary in this case.

The ALJ initially assessed liability to the carriers on a joint and several basis. The Board has carefully considered this view and finds that approach is warranted and well founded in the law. The Workers Compensation Act is not intended to address the relative rights as between respondents and their insurance carriers. Rather, the Act is intended to provide compensation to workmen entitled thereto with a minimum of delay and without having to await the disposition of collateral matters with which they are not concerned.[33] Disputes between carriers concerning their respective liabilities for the payment of compensation to be paid to a claimant on behalf of the insured should not be litigated in the compensation proceedings themselves, but in separate proceedings brought for such purpose.[34]

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[31] The one problem with this preliminary hearing Order was the fact that St. Paul had recently joined the list of carriers and should arguably have been included in the preliminary hearing Order.

[32] K.S.A. 44-508(d); See also *Casey v. Dillons Companies, Inc.*, __Kan. App.__ ,114 P.3d 182 (2005).

[33] *Kuhn v. Grant County*, 201 Kan. 163, Syl.¶ 2, 439 P.2d 155 (1968).

[34] *Id.*, Syl. ¶ 3.

Where, as here, there is no dispute as to the compensability of claimant's claim, each carrier identified in the litigation should be found jointly and severally liable for the temporary total disability benefits and medical expenses incurred during the course of the claim. While this may result in some accounting challenges and possibly arbitration or additional litigation in the district courts, that concern has no place in this litigation. Rather, the focus here is to rule upon the compensability of claims as opposed to the relative liabilities of the competing carriers. This approach will, in the Board's view, allow the orderly procession of compensable claims, leaving the carriers to fight their battles in another forum, leaving the claimant alone to heal and hopefully return to work.[35]

The ALJ's Award is hereby modified to find each of the carriers jointly and severally liable for all of claimant's medical expenses and temporary total disability benefits as well as the costs associated with the independent medical examination, except that Berger and its carrier are solely responsible for the medical expenses and temporary total disability benefits accruing during its coverage period.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 3, 2005, is affirmed in part, reversed in part and modified as follows:

The claimant is entitled to 6.14 weeks of temporary total disability compensation from December 11, 2000 to January 22, 2001, at the rate of $204.88 per week or $1,257.96, and 5 weeks of temporary total disability compensation from October 22, 2001 to November 25, 2001 at the rate of $204.88 per week or $1,024.40, for a total of $2,282.36 of temporary total disability compensation, to be paid by all the carriers jointly and severally.

The claimant is also entitled to 87.15 weeks of permanent partial disability compensation at the rate of $204.88 per week or $17,855.29 for a 21 percent permanent partial disability to the whole body, to be paid Atchison and Commerce.

As of November 16, 2005 there would be due and owing to the claimant 11.14

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[35] This view is not novel and has been advocated by the Board on numerous occasions albeit as a minority voice. See e.g. *Keele v. Haz Mat Response, Inc.*, No. 255,121, 2003 WL 22401246 (Kan. WCAB Sept. 26, 2003); *Quattlebaum v. McCormick-Armstrong Co., Inc.*, No. 250,813, 2002 WL 985411 (Kan. WCAB Apr. 25, 2002); *Celuch v. Luce Press Clipping, Inc.*, Nos. 222,711 & 239,619, 2002 WL 31103954 (Kan. WCAB Aug. 2002); *Kelley v. Kinedyne Corporation*, No. 233,493, 2000 WL 759359 (Kan. WCAB May 17, 2000).

weeks of temporary total disability compensation at the rate of $204.88 per week in the sum of $2,282.36 to be paid by all the carriers jointly and severally. Plus 87.15 weeks of permanent partial disability compensation at the rate of $204.88 per week in the sum of $17,855.29 to be paid by Atchison and Commerce, for a total due and owing of $20,137.65, which is ordered paid in one lump sum less amounts previously paid.

Claimant's medical expenses as outlined in Exhibit 1 of the Regular Hearing Transcript dated February 26, 2004 are to be paid by all the carriers jointly and severally.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
William G. Belden, Attorney for Respondent and Commerce & Industry Ins. Co.
Anne E. Hawley, Attorney for Respondent and Fireman's Fund Ins.
Thomas J. Walsh, Attorney for Respondent and Superior National Ins. Co./REM
Katharine M. Collins, Attorney for Respondent and St. Paul Fire & Marine Ins. Co.
Jennifer Arnett, Attorney for Respondent Berger and Cincinnati Ins. Co.
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director